

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1481, 78-1001

To be argued by
SHEILA GINSBERG

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Respondent,

against

DANIEL SCOTT PALTER,

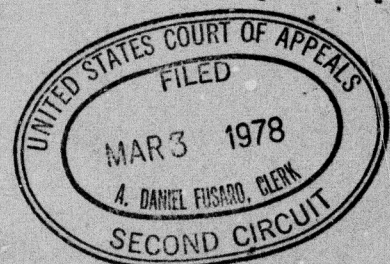
Appellant.

On Appeal from a Judgment of the
United States District Court
for the District of Connecticut

**BRIEF FOR APPELLANT,
DANIEL SCOTT PALTER**

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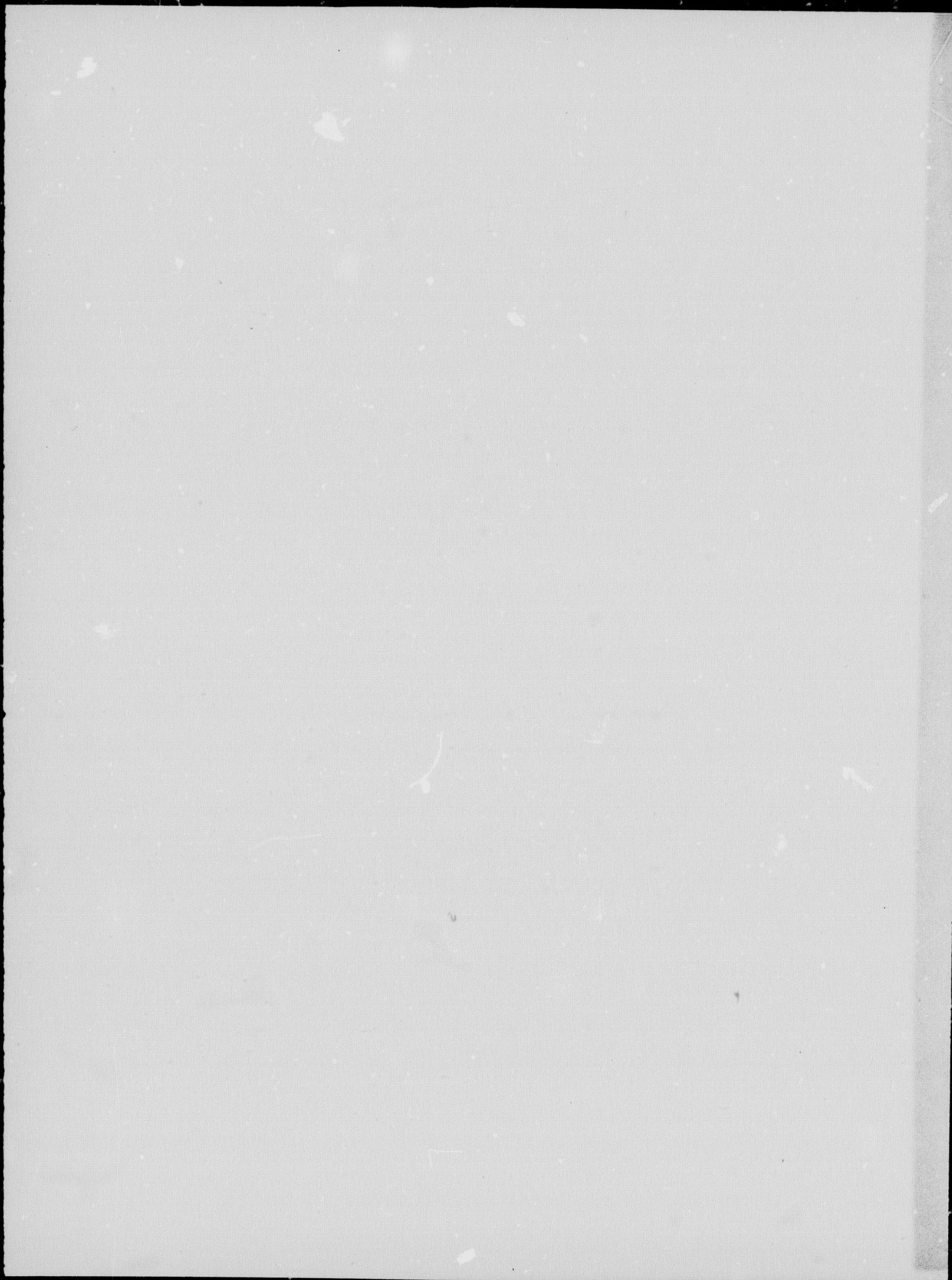


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STATUTES INVOLVED

1. Rule 11(c) provides:

"(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

-----X
UNITED STATES OF AMERICA,
Respondent.
-against-
DANIEL SCOTT PALTER,
Appellant.
-----X

Docket No. 78-1001

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

1. Whether the conviction must be vacated for failure to comply with the requirements of Rule 11 in that the judge neglected to inform appellant of the maximum sentence to which he was exposed, of his right not to incriminate himself if he went to trial, and of his right to a jury trial.

2. Whether the District Judge abused his sentencing discretion when he ignored uncontroverted evidence and his own findings of fact and refused to permit appellant to serve his sentence in a manner which would not threaten his survival.

Statement Pursuant to Rule 28(3)

Preliminary Statement

Daniel Scott Palter appeals from a judgment of the United States District Court for the District of Connecticut (The Honorable Robert C. Zampano) entered November 21, 1977 after a plea of guilty to one count of conspiracy to manufacture amphetamines in violation of 21 U.S.C. §846, and from a December 5, 1977 denial of his motion pursuant to Rule 35. Appellant was sentenced to a four-month period of incarceration to be followed by a two-year period of special parole. On December 16, 1977, this Court granted appellant's motion to stay his surrender and appellant is presently released on his own recognizance pending the outcome of this appeal.

The law firm of Phillips, Nizer, Benjamin, Krim & Ballon was retained as counsel in the District Court and continues as counsel on appeal.

Statement of Facts

The Guilty Plea

On June 29, 1977 appellant Daniel Scott Palter was charged, along with co-defendants Owen Bradley Davies, and Andy Castro, with the manufacture of amphetamines in violation of 21 U.S.C. §841(1)(a) (Count One) and with conspiracy to commit the substantive offense in violation of 21 U.S.C. §846 (Count Two)¹.

¹ The indictment is set forth in Appellant Palter's separate Appendix at 4-6.

On September 27, 1977 appellant appeared in the District Court, withdrew his plea of not guilty and offered to plead guilty to count two - the conspiracy charge - (Palter App. at 92)³.

In a colloquy with appellant, Judge Zampano explored the nature of the crime and appellant's participation in it (Palter App. at 10-12). In addition, the Judge recited certain constitutional rights which appellant would waive by pleading guilty. Specifically he stated:

THE COURT: Do you understand that you need not change your plea to Count Two, and if your plea of not guilty remained with respect to Count Two, you would have an immediate trial? Miss Ginzberg would represent you and the government would have to prove beyond a reasonable doubt each and every element at the trial. You would have a right to confront the government witnesses, and if you wish, you could call your own witnesses. By your change of plea, you are waiving your constitutional rights. Do you understand that?

MR. PALTER: Yes.

THE COURT: As you understand you are not going to have a trial?

MR. PALTER: Yes.

THE COURT: Is it of your free will?

MR. PALTER: Yes.

THE COURT: Has anyone tried to influence you or coerce you in this regard?

MR. PALTER: No.

(Palter App. at 13)

² The entire transcript of appellant's plea is set forth in his separate Appendix at 7-23.

³ Pursuant to agreement with the government, count one was dismissed at the time of sentencing (Palter App. at 14). The agreement, signed by appellant, is annexed to appellant Palter's Appendix at 65 to 66.

However, nowhere did the court below articulate that if appellant chose to go to trial he had the right to a jury trial, as well as the Fifth Amendment right not to incriminate himself. Similarly the court neglected to inform appellant of the maximum penalty to which his guilty plea would expose him:

THE COURT: Do you realize that you could be punished for five years and fifteen thousand dollars? Do you understand what the special parole plan is?

MR. PALTER: Yes. That has been explained to me.

THE COURT: Has it been explained to you that in the two-year special parole plan that I must impose a minimum, mandatory sentence; that I have to do that?

MR. PALTER: Yes, sir.

THE COURT: Do you further understand that if this special parole is revoked because of violation, the original term shall be increased by a period of the special parole?

MR. PALTER: Yes.

THE COURT: Do you understand that it is not diminished by the time spent on the special parole in the event the term of imprisonment is imposed. Do you understand that?

MR. PALTER: Yes, sir.

(Palter App. at 15-16)

Here, what the court did not reveal is that the maximum special parole term to which appellant was subject under 21 U.S.C. §846 could be lifetime special parole.

At the court's request, the Assistant United States Attorney then presented the facts the government asserted it could prove at trial. In summary, those facts as they relate

to appellant were that during three separate periods he aided Davies, the chemist, and Castro, the salesman, in the manufacture of amphetamines, to wit, (1) appellant's apartment in Queens was used by Davies in his first, albeit unsuccessful, attempt to produce the drug; (2) later, in Connecticut, when Davies was successful, appellant helped him capsule the drug; and (3) sporatically from June 1976 until his arrest in June 1977 appellant aided Castro and unindicted co-conspirator Edgar Valesquez by making occasional purchases of the chemical precursors necessary to produce the drug (Palter App. at 17-22). After this recitation, appellant was permitted to enter his plea of guilty to count two (Palter App. at 23).

The Sentencing

Prior to the sentence, the Assistant United States Attorney, in a letter to Judge Zampano, detailed the extent of appellant's participation in the offense and his cooperation with the government⁴. As to appellant's involvement in the crime, the prosecutor explained that it was motivated by friendship, not venality.

He stated:

" We further believe that based upon the evidence available to the Government in this case, Palter's involvement in these actions was based primarily out of his friendship with the other defendants. Proof as it now stands indicates that Palter realized no profit from these transactions. Nor does it appear that Palter was the financier of this operation." (emphasis added)

(Palter Appendix at 38)

⁴ The entire letter is set forth in the Palter Appendix at 37-38.

As to appellant's cooperation, the prosecutor evaluated it as "complete, truthful and candid." Moreover, according to the government the evidence provided by appellant was primarily responsible for the guilty pleas by his co-defendants as well as possible prosecutions against others previously unknown to the government. Specifically, the letter provides:

"Palter has met both with the undersigned and with agents of the Drug Enforcement Administration on several occasions since that time. At these meetings, Palter has detailed fully not only his own participation in the manufacture of amphetamines and methaqualone, but also the participation of the other defendants. He has also detailed the participation of certain other individuals, not named as defendants in the indictment, whose identity was unknown to the Government prior to the time of Palter's cooperation. We believe that his disclosures have been complete, truthful and candid.

Based largely upon the statements that Palter has given to the Government, the other two defendants in this case, Davies and Castro, made decisions to enter pleas of guilty to the charges pending against them. We believe that without Palter's cooperation, these defendants may well have decided to go to trial on these charges, although we believe that the Government had overwhelming evidence of guilty with respect to all defendants. In any event, we believe that Palter's statements and his cooperation with the Government substantially strengthened our case against his co-defendants.

Additionally, Palter's cooperation has given the Government information, hitherto unknown, concerning other individuals who were involved with these defendants both in the manufacture and distribution of controlled substances. We believe that his cooperation will give rise to other potential cases against these individuals."

(Palter App. at 37-38)

In conclusion, the government took the position that:

"[i]n view of Palter's cooperation in this case, and in view of his psychiatric prognosis, we urge the Court to give Palter every consideration with respect to sentencing."

(Palter App. at 38)

The "psychiatric prognosis" to which the government's letter refers was set forth for the court below in the reports of Dr. Marjorie White, appellant's treating psychologist, and Dr. Lawrence Kaplan, a psychiatrist who examined appellant three times after his arrest.⁵

Dr. White, who treats appellant three times weekly, diagnosed him as having a "[c]hronic depressive reaction with suicidal tendencies" (Palter App. at 55). In her report the doctor chronicals the history of appellant's suicide attempts beginning with his early fixation with suicide after his paternal grandfather took his own life. (Palter App. at 55). The report reveals that from the ages of 20 to 22 appellant made several attempts to kill himself with a combination of alcohol and tranquilizers and, at one point, in an almost fatal attempt, he used rat poison. According to Dr. White, appellant "has an almost reflex tendency to think of suicide as a solution when he is overwhelmed by feelings of failure" (Palter App. at 56).

Dr. White then specifically describes how "feelings of failure" have plagued appellant throughout his life. He was

⁵ Both Dr. White's report and Dr. Kaplan's report were appended to appellant's presentence memorandum and are set forth in the Palter Appendix at 55 to 58 and 59 to 64, respectively.

always unable to make friends -- "his constitutional predisposition to obesity...made socializing with other children painful and often impossible" (Palter App. at 55). He was rejected by the Army, despite several years in ROTC -- "[i]n 1969, as he has pointed out, men were being drafted in the Army, who formerly were regarded as unacceptable, but he, once again, felt rejected as unfit" (Palter App. at 56). Finally, while he was scholastically successful in school -- he graduated from Dartmouth College and Stanford Law School -- he was never able to get a job as a lawyer. Even family connections to law firms didn't work and appellant was eventually compelled to accept a job in the family shoe import business.

As to the motivation for involvement in the crime, Dr. White explained that at the time of his initial participation, appellant was in a particularly "hopeless state of mind" having just suffered the break-up of a six year relationship with the "hysterical young woman who had driven him to take rat poison" (Palter App. at 57). According to Dr. White, appellant participated in this conspiracy because he was vulnerable to any persons who would respect his intelligence and were willing to befriend him.

"The chronic depressive has a desperate need to be part of something as a way of preserving life, because, to feel like a perpetual outsider, can be an overpowering invitation to suicide."
(Palter App. at 57)

Despite appellant's history, Dr. White's prognosis was hopeful. The doctor perceived the fact of appellant's cooperation with the government and his commitment to therapy as an essential and positive step toward rehabilitation:

"In treatment, M. Palter has begun to consider some of the problems which have driven him throughout his life. A capacity to consider problems intrinsically involves a slowing down in the need to act in order to prove one's effectiveness, no matter how ill-advised the action. To be able to consider the consequences of a possible act and to turn away from rash decisions represents a major positive change in personality. Mr. Palter appears to be moving in this direction, with the likelihood that he will be able in the future to use his considerable talents and intelligence for purposes constructive for himself and society. Indeed, he has already become an integral and effective contributor to the family shoe importing business which he had joined temporarily in 1972."

(Palter App. at 57)

However, with regard to the effect of incarceration on appellant, Dr. White was very pessimistic because she believed that the fact of imprisonment as well as the pressures -- both physical and psychological-- from other inmates would catapult appellant back into chronic depression. Specifically the doctor concluded:

"In my professional judgment, incarceration in prison will confront Mr. Palter with a very high risk, not only to his psychological rehabilitation, but to his very survival. Given his long-standing vulnerability both physical and psychological, to the usual assaults and setbacks arising in human relations, the kind of destructive pressures that he will inevitably be subjected to by other prisoners can only catapult him back into chronic depression. Since prisoners' activities cannot be closely controlled on a constant basis, especially given contemporary conditions, I believe there is great probability that Mr. Palter will, as he has often before, seek suicide as a way out of intolerable depression at being the butt of others' cruelty. It is absolutely inevitable that the fact of incarceration itself will only confirm his life-long conviction of hopelessness."

(Palter App. at 58)

Dr. Lawrence Kaplan confirmed Dr. White's evaluation of appellant (Palter App. at 59). In Dr. Kaplan's concluding opinion he stated:

"This young man is undoubtedly suffering from a schizo-affective disorder, with characterological manifestations. He has a rather strange and detached affect, is self deprecatory, at the same time that he is grandiose in other areas, and this mixed grandiosity appears to be the result of an obviously disturbed and deficient ego function. His involvement in the charges against him appears to be the result of a significant and prolonged personality disorder.

Although there is no overt evidence of psychosis at this time, the prognosis must be seriously guarded, particularly with his history of suicidal depression, as well as a family history of another suicide. I would venture the opinion that incarceration would be a serious threat to this patient's survival, both from the point of view of his psychosexual confusion and his schizo-affective disorder, and would seriously recommend continued supportive psychotherapy." (Palter App. at 63-4)

At sentencing it was clear that Judge Zampano accepted and was moved by this evidence. Of appellant's psychiatric problems, the Judge stated:

"...I think Mr. Palter's case is a sad one. He has outstanding mental capacity, but he is suffering from severe psychological problems. I don't think it serves any useful purpose to put the findings of the psychiatrist on the record. Counsel has seen them, I have seen them, the Probation Officer has seen them. So we do get a picture of a man that is somewhat different than one would think when you read the official version of the crime." (Palter App. at 30)⁶

In addition, the Judge acknowledged appellant's cooperation with the government stating:

⁶ The entire transcript of the Sentencing Proceeding is set forth in the Palter Appendix at 24-36.

"On the credit side, of course, in his cooperation. There is no dispute about that.. He gave a full and open disclosure of his role and the roles of the others, and the Government appreciates that and has sent me letters, I think at least two, highlighting the fact that Mr. Palter did come forward and was most cooperative." (Palter App. at 31)

Nonetheless, Judge Zampano decided to sentence appellant for a period of 4 months incarceration to be followed by a two year term of special parole (Palter App. at 32). It appears that the decision was premised, inter alia⁷ on the Judge's acceptance of the Presentence Report characterization -- sharply disputed in appellant's presentence memorandum -- that the crime was a "large scale drug conspiracy".⁸ The Judge began his sentence colloquy by stating:

"Well, it is obvious we have here facially what appears to be a large drug conspiracy with all the indicia of a plan to sell these drugs on a large scale and at huge profits.

I would list all the factors, but they're in the Pre-sentence Report from the stationery down to the equipment, down to the planning areas. However, as you delve into it and look at the people that were involved, particularly Mr. Palter, you get somewhat of a different rationale for the operation. (Palter App. at 29-30)

While during the sentencing of co-defendant Castro, the Judge repeated his characterization,⁹ he finally recognized it as error in the Davies sentencing and accepted the defense position:

⁷ The Judge also referred to appellant's legal training, his mental ability and the length of his involvement in the crime. Palter Appendix at 31.

⁸ By agreement with the government and the Probation Department, the Presentence Report will be docketed, under seal, in this Court. Appellant's presentence memorandum is set forth in the Palter Appendix at 39.

⁹ During the Castro sentence the Judge said: "Their personalities and their backgrounds just don't fit what appears to be a major drug conspiracy." (Castro Appendix at 93).

"I accept the fact that it was not a scheme to sit down and make a great deal of money as most of these conspiracies are designed."

(Castro App. at 110)

Having determined that appellant serve a period of incarceration, Judge Zampano sought to avoid the dire psychiatric consequences predicted by the two therapists. Therefore, he recommended that appellant be incarcerated at the Metropolitan Correctional Center where the Judge believed the "atmosphere was different" and appellant's therapy could be continued:

"What I have decided to do is give him a sentence, but it must be served in the Metropolitan Correctional Center in New York City where I know he will be in a different type of atmosphere than a regular prison or correctional center.

I don't see any reason why psychiatric help can't continue there. If he is not incarcerated in the Metropolitan Correctional Center, and I only can recommend it, I can't order it, I will entertain a motion for reduction of sentence."

* * *

"...but I want to make sure that he is not put in a regular prison or one of the usual correctional centers. I understand the Metropolitan Correctional Center has the facilities and the ability to handle someone with Mr. Palter's background."
(Palter App. at 31-32)

When the defense counsel disputed the availability of psychiatric treatment at MCC and asked that appellant be permitted to serve his sentence on the weekends so as to continue therapy, the Judge adjourned surrender pending further submissions from the Probation Department and counsel on that question
(Palter App. at 32-33).

Post-Sentence Proceeding

In its November 28, 1977 memorandum the Probation Department¹⁰ acknowledged two critical facts: (1) that Bureau of Prison's statistics reveal that weekend service of sentence is routinely granted and (2) that the Metropolitan Correctional Center has no facilities for any ongoing psychiatric treatment. Specifically, the memorandum asserted:

"Concerning the availability of psychological services to inmates at the MCC, I was advised that they have a full-time psychiatrist and a psychologist on duty at all times. Although ongoing therapy sessions would not be possible, the medical/supportive staff would be available to Mr. Palter in case of emergency (in re: severe periods of depression and in case of any suicide attempts)." (emphasis added) (Palter App. at 67)

Nonetheless, the Probation Department recommended against weekend service solely because of the lengthier sentences imposed on the co-defendants.

"In view of the short term of incarceration imposed in this case, and in comparison to the lengthier sentences meted out to co-defendants Davies and Castro, I recommend that the Judgment in Palter's case remain intact, as imposed on November 21, 1977." (Palter App. at 67)

Defense counsel's affidavit in support of the sentencing alternative took issue with the Probation Officer's assertion that a full time psychiatrist was on duty at MCC at all times.¹¹ Counsel related that testimony taken in Wolfish v. Honorable

¹⁰ The Probation Department Memorandum is set forth in the Palter Appendix at 67.

¹¹ Counsel's affidavit is annexed to the Palter Appendix at 69.

Edward Levi, (75 Civ. 6000)¹² established that the only psychiatrist available at MCC was then working on a consulting basis 20 hours a week. Consequently, counsel argued not only were there no facilities for on-going therapy, there was no assurance that MCC was capable of handling an emergency situation (Palter App. at 72).

On the other hand, counsel asserted that at the time of the motion approximately 24 persons were serving weekend sentences at MCC and further, that Larry Taylor, the Warden of that institution, assured counsel that there would be no problem in appellant's serving the sentence in that manner (Palter App. at 74).

Dr. White, in a December 1, 1977 letter urged the court to accept the weekend alternative. A continuous four-month period of incarceration would, the doctor explained, have a "catastrophic effect" on appellant's mental and physical health because, in addition to the concerns expressed in her first report, it was now clear that incarceration would result in a four-month hiatus in appellant's therapy. Dr. White opined that this would "virtually destroy" all the progress he had made. While Dr. White was sanguine about the advisability of any incarceration, she implored the resort to the weekend alternative, for it would allow appellant to continue therapy and better prepare himself each week to deal with imprisonment on the weekends (Palter App. at 78-79).

¹² This case is still sub judice before Magistrate Schreiber on the issue of adequacy of health care at MCC. Wolfish v. The Honorable Edward Levi, supra, slip op. at 1195.

¹³ Dr. White's December 1, 1977 letter is annexed to the Palter Appendix at 78.

Significantly, the government did not oppose this sentencing alternative.¹⁴ Moreover, it rejected the Probation Department suggestion that weekend service would reduce the severity of the sentence. In his November 30, 1977 letter the prosecutor asserted:

"The government has no objection to the service of Palter's sentence on weekends at the Metropolitan Correctional Center in New York. We do not take issue with the position of the defendant that such a sentence would enable the defendant to continue his psychiatric therapy without depreciating the severity of the sentence or the offense.

(Palter App. at 80)

On December 5, 1977, without stating any reason therefore, Judge Zampano declined to order weekend service of the sentence and directed that appellant serve the continuous four-month term (Palter App. at 81).

POINT I

THE CONVICTION MUST BE VACATED FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF RULE 11 IN THAT THE JUDGE NEGLECTED TO INFORM APPELLANT OF THE MAXIMUM SENTENCE TO WHICH HE WAS EXPOSED, OF HIS RIGHT NOT TO INCRIMINATE HIMSELF IF HE WENT TO TRIAL, AND OF HIS RIGHT TO A JURY TRIAL.

Rule 11(c), F.R.Cr.P. provides in pertinent part:

Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

¹⁴ The government's letter to Judge Zampano is annexed to the Palter Appendix at 80.

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

* * *

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself;

* * *

The plain language of the Rule makes clear that it is mandatory in nature -- in order to establish a valid plea the judge must explicitly inform the defendant of "each and every" element enumerated in Rule 11. United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976); United States v. Alejandro, docket no. 77-1338, slip op. 1517 (2d Cir. February 9, 1978); United States v. Saft, 588 F.2d 1073 (2d Cir. 1977); Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977). In United States v. Journet, supra, 544 F.2d at 635, this Court explained that the legislative intent in amending Rule 11 was to "codify" specific advice of rights that must be given before a guilty plea can be accepted. Congress, as this Court persuasively established, had considered and rejected a more general version of the rule which would have left to the judge's discretion the advice to be given. id.

In contrast, the rule as enacted, removes that discretion and sets forth the explicit information which must be imparted

by the judge to the defendant in open court. Of course, that is not to say that the advice of rights must be given in haec verba. United States v. Saft, supra, 558 F.2d at 1079. The manner in which a judge communicates the information is up to him so long as the substance of what he communicates satisfies the strictures of Rule 11.¹⁵ Here, the District Court judge neglected to communicate, in any way, three substantive rights mandated by the Rule, and consequently the conviction must be vacated.

First, the judge failed to inform appellant that the maximum sentence to which his guilty plea exposed him included the possibility of lifetime special parole. The conspiracy to manufacture amphetamines carries a maximum sentence of a 5 year term of imprisonment, a \$15,000 fine, and a mandatory minimum two year period of special parole. 21 U.S.C. §§846, 841(1)(a). Under the statute, however, the judge has the power to impose a special parole term for the life of the offender. United States v. Jones, 540 F.2d 465, 468 (10th Cir. 1976); United States v. Rich, 578 F.2d 980, 987 (8th Cir. 1975); cert. denied, 427 U.S. 907 (1976).

In this regard, this case is identical to United States v. Alejandro, supra, slip op. at 1519-20, and United States v. Journet, supra, 544 F.2d at 636. There this court vacated the guilty pleas for failure to apprise the defendant of the possibility

¹⁵ In Saft, Judge Friendly stated: Congress meant to strip district judges of freedom to decide what they must explain to defendant who wishes to plead guilty, not to tell them precisely how to perform this important task in the great variety of cases that would come before them. United States v. Saft, supra, 558 F.2d at 1079. (emphasis in the original)

of lifetime special parole even though the total sentence imposed -- incarceration plus special parole -- was less than the maximum sentence of which the defendant had been informed. Obviously the gravamen of the error is that at the time of the plea the defendant was not sufficiently informed to make his plea knowledgeable.

Here, the extent of the colloquy regarding penalties was similarly deficient:

THE COURT: Do you realize that you could be punished for five years and fifteen thousand dollars? Do you understand what the special parole plan is?

MR. PALTER: Yes. That has been explained to me.

THE COURT: Has it been explained to you that in the two-year special parole plan that I must impose a minimum, mandatory sentence; that I have to do that?

MR. PALTER: Yes, sir.

THE COURT: Do you further understand that if this special parole is revoked because of violation, the original term shall be increased by a period of the special parole?

MR. PALTER: Yes.

THE COURT: Do you understand that it is not diminished by the time spent on the special parole in the event the term of imprisonment is imposed. Do you understand that?

MR. PALTER: Yes, sir.

At no time did this dialogue between the Judge and appellant explore, or for that matter mention, the outer lifetime limits of the special parole term. Indeed, what the Judge actually said -- "Has it been explained to you that in the two year special parole plan that I must impose a minimum mandatory sentence..." -- was easily subject to the misunderstanding that the maximum parole term was for a period of two years and the mandatory minimum was somewhere within that time frame.

That appellant asserted that he understood the special parole plan does nothing to establish that he knew what the maximum term could be. Moreover, in the context of the discussion with the judge it appears that both appellant and the judge were making reference only to the operation of special parole and the possibility of increasing actual incarceration by the term of special parole rather than the possible length of parole.

The failure to inform a defendant of the maximum possible sentence, without more, mandates that the plea be vacated. United States v. Alejandro, supra, slip op. at 1519-20; see also, United States v. Journet, supra, 544 F.2d at 636. However, here there was more. This record is void of any mention of the specific and fundamental caution that by pleading guilty appellant relinquished his right not to incriminate himself at trial and to be tried by a jury.

While the judgment enumerated, inter alia, the right not to plead guilty and the right to a trial in order to put the government to its proof, this will not suffice. United States

v. Journet, supra, 544 F.2d at 636; United States v. Saft, supra, 558 F.2d at 1079. The right to a trial is not, ipso facto, the right to a jury trial. Similarly, the right to put the government to its proof is not tantamount to the right not to testify. Nothing said in the proceeding below provided elucidation of these separate rights. cf. United States v. Saft, supra, 558 F.2d at 1079; United States v. Michaelson,¹⁶ 552 F.2d 472 (2d Cir. 1977). Moreover, in the context of a case where, as here, the defendant has signed a plea agreement¹⁷ which sets forth his promise to cooperate, and, in fact, he had already provided some evidence, it is particularly important that he be informed by the judge that should he change his mind on the plea, he need not, despite the agreement, provide any further incriminating evidence.

Because the court below failed to inform appellant in accordance with the strictures of Rule 11(c), the conviction must be vacated and the case remanded for repleading.

¹⁶ United States v. Michaelson, supra, 552 F.2d at 477 is not to the contrary. In Michaelson the result was different because of a combination of factors, none of which are present here. Specifically, the court there found that proximity in time to the decision in United States v. Journet, supra, coupled with the fact that Michaelson had sought to plead after his trial had begun and after he asserted his intention to testify at that trial, minimized the judge's failure to inform Michaelson that he had the right not to testify.

¹⁷ The text of the agreement is set out in the Palter Appendix at 65.

POINT II

THE DISTRICT JUDGE ABUSED HIS SENTENCING DISCRETION WHEN HE IGNORED UNCONTROVERTED EVIDENCE AND HIS OWN FINDINGS OF FACT AND REFUSED TO PERMIT APPELLANT TO SERVE HIS SENTENCE IN A MANNER WHICH WOULD NOT THREATEN HIS SURVIVAL.

A sentence, although within the statutory maximum, is nonetheless invalid and will be vacated on appeal if its imposition was the result of an abuse of discretion. United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976); United States v. Stein, 544 F.2d 96, 101 (2d Cir. 1976); United States v. Maples 501 F.2d 988 (4th Cir. 1974); United States v. Schwarz, 500 F.2d 1350, 1351 (2d Cir. 1974); United States v. Laca, 499 F.2d 922 (8th Cir. 1974); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970); Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1967); United States v. Wiley, 267 F.2d 453 (7th Cir. 1959). Appellate courts have found an abuse of discretion in a variety of circumstances. Thus, reversible error is committed where the judge has imposed sentence in an automatic or mechanical fashion, [United States v. Schwarz, supra, 500 F.2d at 1351; United States v. Baker, 487 F.2d 360 (2d Cir. 1973); United States v. Daniels, 446 F.2d 967, 970 (6th Cir. 1971)], where he has relied on a material mistake of fact or false assumption [United States v. Robin, supra, 545 F.2d at 779; United States v. Stein, supra, 544 F.2d at 101; United States v. Malcolm, supra, 432 F.2d at 816], where he has considered an improper criterion

[United States v. Maples, supra, 501 F.2d 988; United States v. Laca, supra, 499 F.2d 922; United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); United States v. Wiley, supra, 267 F.2d 453], or where he has refused to consider a proper one, Yates v. United States, 356 U.S. 363, 366-7 (1958); United States v. Robin, supra, 545 F.2d at 779; United States v. Malcolm, supra, 432 F.2d at 817; Briscoe v. United States, supra, 391 F.2d 984.

Applying these standards to the particular facts in this case, it is clear that the District Court abused its discretion when it ignored uncontroverted evidence and its own finding of fact and refused to permit appellant to serve his sentence in a manner which would not threaten his survival.¹⁸ The undisputed psychiatric evidence presented below established that incarceration would have a catastrophic effect on appellant's stability and greatly enhance the risk of his suicide. Dr. White, in her report to the Court, had opined that appellant's particular vulnerability to the physical and psychological assaults of others made it inevitable that the ordinary pressures of prison would catapult him back into chronic depression.

"I believe there is great probability that Mr. Palter will, as he has often before, seek suicide as a way out of intolerable depression at being the butt of others cruelty."
(Palter App. at 58)

¹⁸ While appellant maintains that his conviction must be vacated in any event due to the deficiency in the plea proceeding [supra, Point I], a decision on the legality of the sentence is nonetheless important to the ultimate resolution of this case.

Both Dr. White and Dr. Kaplan urged a continuation of the therapy already underway.

Judge Zampano credited this evidence and, acknowledged that appellant suffered from "severe psychological problems" and that his continued stability was contingent upon continued psychiatric therapy.¹⁹ Consequently, while he sentenced appellant to a four month term of imprisonment, he sought to accommodate the psychiatric concerns by recommending that the sentence be served at MCC where "I know he will be in a different type of atmosphere" and where there was no "reason why psychiatric help can't continue"²⁰ (Palter App. at 31).

The problem with the sentence is that MCC does not have the facilities to provide appellant with the on-going treatment all parties and the judgee agree he so desperately needs.²¹

In a post sentence proceeding, which the judge himself had invited, the facts presented by appellant, as well as by the Probation Department, established that MCC was not equipped

¹⁹ The judge stated: "...I think Mr. Palter's case is a sad one. He has outstanding mental capacity, but he is suffering from severe psychological problems. I don't think it serves any useful purpose to put the findings of the psychiatrist on the record. Counsel has seen them, I have seen them, the Probation Officer has seen them. So we do get a picture of a man that is somewhat different than one would think when you read the official version of the crime." (Palter App. at 30).

²⁰ The judge also said: "...but I want to make sure that he is not put in a regular prison or one of the usual correctional centers. I understand the Metropolitan Correctional Center has the facilities and the ability to handle someone with Mr. Palter's background." (Palter App. at 32).

²¹ And, as to the "different atmosphere" of MCC, see generally Louis Wolfish v. The Honorable Edward Levi, docket no. 77-2035, slip op. 1195 (2d Cir. January 24, 1978).

to carry out the judge's directions. Moreover, it was reaffirmed, without contradiction from the government, that a straight four month period of incarceration would have disastrous consequences to appellant. Nonetheless, without stating any reason therefore, and without any supporting evidence, the judge denied appellant's motion to modify the sentence and directed surrender to MCC to serve a straight four-month term.

The judge's decision, which thwarted his own stated intention in imposing the original sentence, was an abuse of discretion. To the extent that the judge changed his mind and concluded that appellant could survive a straight period of incarceration without therapy, the record is devoid of any evidence to support that conclusion. See United States v. Looney, 501 F.2d 1039, 1041 (4th Cir. 1974); United States v. Powell, 487 F.2d 329 (4th Cir. 1974); United States v. Mercado, 469 F.2d 1148, 1152-3 (2d Cir. 1972). As such, it is tantamount to a mistake of fact.²² United States v. Robin, supra, 545 F.2d at 779; United States v. Stein, supra, 544 F.2d at 101; United States v. Malcolm, supra, 432 F.2d at 816.

To the extent that the judge was motivated by the Probation Department argument that the sentences of the others

²²This was not the only one. The record reveals that the length of the sentence was premised in part on the judge's mistaken belief -- contested by appellant -- that the crime involved was a large scale drug conspiracy. While in the subsequent sentence of a co-defendant the judge corrected his error, it came too late. The record of appellant's sentence reveals that the mistake played a part in the determination of the sentence.

should preclude a modification of appellant's sentence, it is error for it fails to sufficiently individualize the sentence. Williams v. New York, 337 U.S. 241, 247 (1949); United States v. Schwarz, supra, 500 F.2d at 1351; United States v. Baker, 487 F.2d 360 (2d Cir. 1973). The record below is replete with the facts that distinguish appellant from his co-defendants. Unlike Davies or Castro, he provided early and significant cooperation with the government; indeed, the government credited appellant with the guilty pleas of the others. Unlike Davies and Castro, appellant's participation in the crime was the result of a severe psychological disorder and he made no profit from the enterprise.

Surely, on this record the sentences of the other defendants should not have induced Judge Zampano to deny a sentencing alternative which the government asserted would not depreciate the seriousness of the offense, and which the uncontroverted evidence established was critical to appellant's very survival. On these facts, the denial of the motion to modify the sentence was an abuse of discretion and should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated, and the case remanded for repleading.

Respectfully submitted,

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Affidavit of Service by Mail

In re:

United States of America v Daniel Scott Palter

State of New York
County of New York, ss.:

Harry Minott

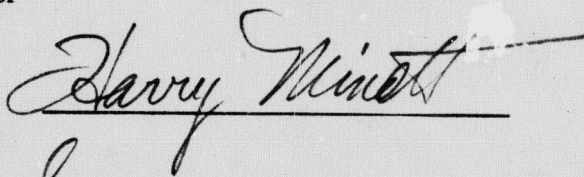
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being duly sworn, deposes and says, that he is over 18 years of age.
That on MAR 3 - 1978, 1978, he served 2 copies of the
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in the above-named matter on the following counsel by enclosing said
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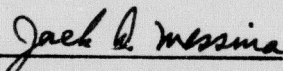
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